

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD J. BISTRITZ and U.S. POSTAL SERVICE,
POST OFFICE, Tampa, Fla.

*Docket No. 96-1798; Submitted on the Record;
Issued September 11, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's right to compensation on the basis that he refused to undergo a medical examination.

Appellant filed a claim on December 2, 1987 alleging on October 21, 1987 he injured his left shoulder in the performance of duty. The Office accepted appellant's claim for contusion left scapula. Appellant filed a notice of recurrence of disability on November 28, 1989 and the Office accepted that he sustained the additional conditions of cervical and thoracic subluxations on February 6, 1990. Appellant completed a claim for compensation on January 19, 1993 requesting wage-loss compensation from January 12 to March 3, 1993. The Office denied appellant's claim for recurrence of disability by decision dated April 23, 1993. Appellant requested an oral hearing and by decision dated September 23, 1993, the hearing representative set aside the Office's April 23, 1993 decision and remanded appellant's claim for further development of the medical evidence. Appellant appealed this decision to the Board, and in an order dismissing appeal dated August 7, 1995¹ the Board found that the hearing representative's decision was not in posture for an appeal.

By letter dated February 6, 1996, the Office referred appellant for a second-opinion evaluation on February 27, 1995 and informed him of the penalty provision for refusing to submit to the examination. In a letter dated February 13, 1996, appellant stated that he was opting to postpone the proposed appointment. He stated, "I am treating your request for examination by yet another physician as a disagreement or conflict in medical opinion." Appellant requested examination by an impartial medical examiner and noted that he had a schedule conflict on February 27, 1996, a dental appointment that had been scheduled for six months. Appellant did not appear for the second-opinion examination. In a letter dated March 1, 1996, the Office provided appellant with the opportunity to present his reasons in writing for failing to keep the scheduled appointment. Appellant responded on March 7, 1996 and reiterated that he had a schedule conflict and that he believed he should be examined by an

¹ Docket No. 94-1895.

impartial medical specialist. By decision dated March 18, 1996, the Office suspended appellant's compensation benefits until the refusal or obstruction stopped.

The Board finds that appellant's failure to keep the scheduled appointment did not constitute a refusal to submit, without good cause, to a medical examination that was reasonably required.

Section 8123(a) of the Federal Employees' Compensation Act provides:

"An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required...."²

The Board has held that a time must be set for a medical examination and the employee must fail to appear for the appointment, without an acceptable excuse or reason, before the Office can suspend or deny the employee's entitlement to compensation on the grounds that the employee failed to submit to or obstructed a medical examination.³ In the present case, the time for the second-opinion examination was set, appellant was duly advised of the scheduled appointment and failed to appear for medical evaluation. The only remaining issue is whether appellant presented an acceptable excuse or reason for his failure to appear. In this regard, the Office's Federal (FECA) Procedure Manual provides:

"Failure to Appear. If the claimant does not report for a scheduled appointment, he or she should be asked in writing to provide an explanation within 14 days. If good cause is not established, entitlement to compensation should be suspended in accordance with 5 U.S.C. § 8123(d) until the claimant reports for examination."⁴

Following notice that appellant failed to appear for examination, the Office, in a March 1, 1996 letter, allowed him 14 days to explain why he failed to keep the appointment, and advised him that if he did not respond or if his reasons were found unacceptable, his entitlement to compensation would be suspended until he agreed to submit to examination as directed. In his response dated March 7, 1996, appellant stated the he did not attend the appointment because he was entitled to an impartial medical examination and because he had a schedule conflict.

The Board finds that the Office properly allowed appellant to submit in writing and duly considered his stated reasons for the failure to keep the scheduled second opinion evaluation. The Board further finds that appellant's assertion that he was entitled to evaluation by an impartial medical examiner is without merit. The Office hearing representative determined that the medical evidence in support of appellant's claim was not sufficient to meet his burden of proof, but was sufficient to require the Office to undertake further development of the medical

² 5 U.S.C. § 8123(a).

³ *Raymond C. Dickinson*, 48 ECAB ____ (Docket No. 95-1193, issued August 22, 1997).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluation Medical Evidence*, Chapter 2.810.14(d) (April 1993).

evidence. Appellant's belief that if the Office undertook further development, then there must be a conflict of medical opinion is not sufficient good cause to refuse to submit to the scheduled appointment.

However, appellant also asserted that he had a schedule conflict on February 27, 1996 in that he had a previously scheduled dental appointment on that date. Appellant informed the Office of this scheduling conflict on February 13, 1996 prior to the scheduled second-opinion evaluation on February 27, 1996. He again noted the schedule conflict in his March 7, 1996 letter. However, the Office did not address this aspect of appellant's contentions. As the Office was aware that appellant had a previous medical commitment on the date in question, the Office should have verified the appointment or rescheduled appellant's appointment with the second-opinion physician and again informed appellant of the consequences of refusing to submit to the examination.⁵

The March 18, 1996 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, D.C.
September 11, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁵ See *Gustavo H Mazon*, 49 ECAB ____ (Docket No. 95-1921, issued October 29, 1997) (The Board noted that if appellant had explained his difficulties in reaching the schedule appointment to the Office prior to the date of the appointment, then the Office should have considered these problems or appellant would have had a reasonable explanation for his failure to keep the appointments).